Office - Supreme Court, U.S.
FILED
FEB 23 1984
ALEXANDER L. STEVAS

No. 83-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES MABRY, COMMISSIONER
ARKANSAS DEPARTMENT OF CORRECTIONS
Petitioner,

v.

GEORGE JOHNSON
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF

RICHARD QUIGGLE
904 W. Second Street
P.O. Box 2651
Little Rock, AR 72203
501 375-2963
Court-appointed Counsel for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i-iii
SUMMARY OF ARGUMENT	1-3
ARGUMENT	3
1. INTRODUCTION	3-4
2. ANALYSIS UNDER CONTRACT PRINCIPLES	4
(A). Contracts And The Constitution	4-6
(B). A Valid Contract Existed	6-7
(C). The State's Tautology	7-8
3. DUE PROCESS CONSIDERATIONS	9
(A). No Reliance, No Due Process Violation	9-12
(B). No Rights To Plea Bargain	12-14
4. THE SUPPOSED PROPHYLACTIC RULE	14-16
5. SIXTH AMENDMENT CONSIDERATIONS	16-18
6. THE REMEDY	18-19
7. GRAVE UNCERTAINTIES AND INTERFERENCE?	19
(A). Grave Uncertainties	19-20
(B). Judicial Discretion	20-21
(C). Prosecutorial Discretion	21
(D). The Withdrawal Of "Innocent" Misstatements	21-22
8. MOOTNESS ISSUE	22-23
CONCLUSION	23

TABLE OF AUTHORITIES

CASES:	Page
Adair v. *U.S.*, 208 U.S. 161 (1908)	6
Bell v. *Wolfish*, 441 U.S., 520 (1979)	9
Blackledge v. *Allison*, 431 U.S. 63 (1977)	8, 19
Blackledge v. *Perry*, 417 U.S. 2 (1974)	16
Brewer v. *Williams*, 430 U.S. 387 (1977)	12
Brown v. *Mississippi*, 297 U.S. 278 (1936)	9
Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961)	4
Castaneda v. *Partida*, 430 U.S. 482 (1977)	5
Coolidge v. *New Hampshire*, 403 U.S. 443 (1971)	9
Coppage v. *Kansas*, 236 U.S. 1 (1915)	6
Cooper v. *U.S.*, 594 F.2d 12 (4th Cir. 1979)	16
DeFunis v. *Odegaard*, 416 U.S. 312 (1974)	23
Douglas v. *California*, 372 U.S. 353 (1963)	9
Duncan v. *Louisiana*, 391 U.S. 145 (1969)	11
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	9, 17, 18
Goldberg v. *Kelly*, 397 U.S. 179 (1970)	14
Government of Virgin Islands v. *Scotland*, 614 F.2d 360 (3rd Cir. 1980)	10, 14, 16, 22
Griffin v. *Illinois*, 351 U.S. 12 (1955)	9
Groppi v. *Wisconsin*, 300 U.S. 505 (1971)	11
Hazelwood v. *U.S.*, 433 U.S. 299 (1977)	5
Jackson v. *Denno*, 378 U.S. 368 (1964)	9
Johnson v. *Mabry*, 707 F.2d 323 (8th Cir. 1983)	4
Jones v. *Alfred H. Meyer Co.*, 392 U.S. 409 (1968)	5
Jones v. *North Carolina Prisoners' Labor Union* 433 U.S. 119 (1977)	12
Klopfer v. *North Carolina*, 386 U.S. 213 (1967)	12
Lee v. *Russell Cty. Bd. of Educ.*, 689 F.2d 769 (5th Cir. 1982)	5
Lochner v. *New York*, 198 U.S. 45 (1905)	5, 6
McQueen v. *Swenson*, 498 F.2d 207 (8th Cir. 1974)	9

Table of Authorities Continued

	Page
Miranda v. *Arizona*, 384 U.S. 486 (1966)	9
Morrisey v. *Brewer*, 408 U.S. 471 (1972)	12
North Carolina v. *Pierce*, 385 U.S. 711 (1969)	16
O'Shea v. *Littleton*, 414 U.S. 499 (1974)	23
Palermo v. *Warden*, 545 F.2d 286 (2nd Cir. 1976)	13
Plessy v. *Ferguson*, 163 U.S. 537 (1896)	5
Pointer v. *Texas*, 380 U.S. 400 (1965)	12
Polk County v. *Dodson*, 102 S.Ct. 445 (1981)	16
Powell v. *McCormick*, 395 U.S. 486 (1969)	23
Reitman v. *Mulkey*, 387 U.S. 369 (1967)	4
Santobello v. *New York*, 404 U.S. 257 (1971)	10, 11, 20
Shelly v. *Kramer*, 334 U.S. 1 (1948)	4
Shepard v. *Maxwell*, 384 U.S. 333 (1966)	12
Steffel v. *Thompson*, 415 U.S. 452 (1974)	23
Strauder v. *West Virginia*, 100 U.S. 303 (1880)	12
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969)	5
U.S. v. *Lieber*, 473 F. Supp. 884 (S.D.N.Y. 1979)	6, 13
Weatherford v. *Bursey*, 429 U.S. 545 (1977)	11
Wolff v. *McDonald*, 418 U.S. 539 (1974)	12
MISCELLANEOUS:	
U.S. Constitution, Article II, § 2	23
42 U.S.C. § 2000e, *et seq.*	5
29 U.S.C. § 151, *et seq.*	5
Ark. Stat. Ann. 85-1-203	13
Hurd, *The Law of Freedom and Bondage*	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-328

JAMES MABRY, COMMISSIONER
ARKANSAS DEPARTMENT OF CORRECTIONS
Petitioner,

v.

GEORGE JOHNSON
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF

SUMMARY OF THE ARGUMENT

The issue is whether a criminal defendant, who has accepted a valid plea proposal, may obtain some form of enforcement of the agreement if the prosecution refuses to perform according to the terms, continues bargaining and eventually obtains a guilty plea to an enhanced sentence. Although contract principles offer poor guidance in this area, there was an offer, acceptance and consideration. The suggestion that there must be detrimental reliance is a mere tautology. The bargain should be enforced as a matter of fundamental fairness. The use of contracts to analyze principles of human rights has historically proven unsuccessful. Despite this, if classic contract principles are utilized, a binding agreement was reached.

There was an offer which was accepted. The promises provided the consideration. The concept of detrimental reliance has no bearing on this case since the prosecutor made it impossible for respondent to perform. Thus, the argument that respondent should have to had detrimentally relied is a tautology, and one which ignores the fact he did plead guilty to an enhanced sentence.

However the principle reason why this agreement should be enforced is that it would be fundamentally fair to do so. This is consistent with other rights enjoyed by an accused, rights which have nothing to do with contracts. Surely an accused should enjoy as much protection of his rights while giving them up as he does at all other stages of the criminal justice system. Moreover, this Court has recognized the importance of plea bargaining to the criminal process. Clearly the system would come to a halt if no pleas bargains were made. While the prosecution may not be required to make offers in any given case, once an offer is made a prosecutor's word should be good, if for no other reason than to assure continued participation in the process by criminal defendants. Afterall, even convicted persons must be treated fairly at the hands of the state.

The supposed "prophylactic rule" is based on a misunderstanding of the opinion below. The court below held that under the facts of this case respondent was entitled to relief. The State offered no proof that the prosecutor reneged on his agreement for acceptable reasons.

The right to effective counsel is also important to the outcome of this case. Defendants ordinarily negotiate only through counsel. If the State is allowed to intrude into the attorney-client relationship, it can destroy that relationship, and it would make the right a sham.

The remedy here is certainly appropriate since respondent did in fact plead guilty, and has served his term of confinement under the enhanced sentence.

The grave uncertainties and interference perceived by the State are illusory. The suggestion that all plea proposals should be in writing would be unworkable. More importantly, one attorney should be able to take the word of another. Also, the opinion below would not interfere with either judicial or prosecutorial discretion. A judge is always free to reject a plea proposal but should state why the proposal is unacceptable. A prosecutor can back out of an otherwise valid agreement provided there is proof his actions are justified. Such proof was not offered here.

Finally, since respondent has served the enhanced sentence and is free on parole, review was improvidently granted, or the case is moot.

ARGUMENT

1. INTRODUCTION

The State[1] advances to this Court a proposition at once as bold as it is self-contradictory:

> A criminal defendant, who accepts an unambiguous offer to plead guilty in exchange for the government's promise to act in a certain way, cannot enforce that agreement unless he has somehow detrimentally relied upon it.

This proposition is bold because it entirely ignores that a criminal defendant should be treated fairly, both procedurally and substantively, by the government. It is self-contradictory because by the very framing of the

[1] This term is used to refer to both the petitioner and the amicus, the Solicitor General of the United States.

proposition only one result is possible: enforcement cannot be obtained.

Given those shortcomings this Court should reject the State's proposition and affirm the Eighth Circuit's opinion below.[2]

2. ANALYSIS UNDER CONTRACT PRINCIPLES

Under the facts of this case, contracts concepts have no place. Most significantly, the law of contracts is ill-suited to Consitutional analysis, and should only be resorted to in the most sparing and exacting of circumstances. Second, even if the law of contracts is to be applied to this case, a valid and enforceable contract existed. Finally, the State's use of the concept of detrimental reliance is based on a false tautology.

(A). Contracts And The Constitution

Without exhaustive analysis it is clear that contract law has evolved to solve the unique problems associated with civil agreements involving commerce. As in the related field of property law, the goal of contract law is to promote certainty and predictability. Many mechanical rules have grown up over the centuries, especially those involved with property contracts, which are not valid at all in the area of human rights.[3]

---

[2] Johnson v. Mabry, 707 F.2d 323 (8th Cir. 1983).

[3] A central tenet of property contracts was that one could sell, or not, to whom one chose. Modern thinking is precisely to the contrary, Shelly v. Kramer, 334 U.S. 1 (1948) (restrictive covenants excluding blacks cannot stand when the force of the state is put behind them); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (state may not allow discrimination based on race through a lease to a private party); Reitman v. Mulkey, 387 U.S. 369 (1967) (state may

One reason to adopt or analogize from one body of law to another is where there is a common heritage. A salient example is Title VII's (42 U.S.C. § 2000e, *et. seq*) predicate in the National Labor Relations Act, 29 U.S.C. § 151, *et seq*. Similarly, Title VII also shares common proof concerns with other non-discrimination laws, *Castaneda* v. *Partida*, 430 U.S. 482 (1977) (statistics in voting rights) and *Hazelwood* v. *U.S.*, 433 U.S. 299 (1977) (statistics in employment discrimination); *Lee* v. *Russell Cty. Bd. of Edc.*, 689 F.2d 769 (5th Cir. 1982) (school desegregation and employment rights). *No* such similarities exist, however, between the field of contracts and Constitutional law. Analogies between the two are historically limited, and after the *Lochner* era, totally discredited.[4]

Moreover, the law of contracts has historically proven to be an awful guide where the principles of human dignity and fairness under the law are concerned.

For example, contracts were the backbone of the entire slavery system, *see*, e.g., Hurd, *The Law of Freedom and Bondage*, Vols. 1 and 2 (Little & Brown, 1862). Also, in the Jim Crow era that followed the Civil War, many states manipulated the right of blacks to contract for the same services as whites, limiting them instead to separate but equal opportunities. *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). The sanctity of contracts also allowed for

---

not, in light of 42 U.S.C. § 1982, allow even private persons to sell to whom they choose); Jones v. Alfred H. Meyer Co., 392 U.S. 409 (1968) (purely private sales agreements, when racially motivated, also violate § 1982), and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (assignments may not be defeated on racial grounds in private park).

[4] Lochner v. New York, 198 U.S. 45 (1905).

inhuman working conditions for bakers, *Lochner* v. *New York*, 198 U.S. 45 (1908); and discrimination against workers who wished to organize, *Coopage* v. *Kansas*, 236 U.S. 1 (1915); *Adair* v. *U.S.*, 208 U.S. 161 (1908).

Given that contract principles, particularly when coupled with "state action," have proven so oppressive to fundamental human rights, this Court should be chary indeed—as was the Eighth Circuit below—to erect an absolute contract rule of detrimental reliance for all criminal defendants as urged by the State.

(B) A Valid Contract Existed

Although contract principles should not necessarily control the outcome in this case, contrary to the assertions made by the State, a valid contract did exist here. Thus, the State's claim that no contract existed which could be enforced is incorrect.

The basic elements of all contracts are offer, acceptance and consideration. When each element is present a valid contract comes into existence.

Here the prosecutor made a classic offer: he promised to recommend a sentence of 21 years to be served concurrently with the 21 year sentence Mr. Johnson was serving, if Mr. Johnson would promise to plead guilty to the charges against him. This offer was communicated to Mr. Johnson, and he accepted it. Mr. Johnson's acceptance was communicated to the prosecutor, who then refused to perform the original offer.[5] Subsequently, Mr.

---

[5] Such promises are good consideration in the law of contracts, U.S. v. Lieber, 473 F. Supp. 884, 892 (S.D.N.Y. 1979).

Johnson did plead guilty to the charges against him, but he was sentenced to a term of 42 years.[6]

Mysteriously, the State argues that Mr. Johnson should not be allowed to enforce the original contract because he did not detrimentally rely on it. This argument totally ignores the fact that Mr. Johnson did plead guilty and an additional sentence of 21 years was imposed on him. It also ignores the fact that Mr. Johnson served the entire sentence required of him. If this performance is not detrimental reliance, it is difficult to imagine what would be.

It is obvious that the only reason Mr. Johnson did not perform according to the terms of the original contract is because the prosecutor made that performance impossible by improperly withdrawing the offer.

It is inconceivable in the commercial setting that a contract *and* detrimental reliance would not be found where the injured party had performed twice as much as the original agreement contemplated.

(C) The State's Tautology

The State's suggestion that the concept of detrimental reliance be injected into the plea bargaining process is inequitable, factually incorrect and tautological.

The concept of detrimental reliance is an equitable principle that was engrafted into the law of contracts. The essence of the concept is that courts will not allow a party to avoid the terms of a failed agreement where the other party has changed their position or been prejudiced because he believed there to be an agreement.

---

[6] That the original offer was accepted before it was supposedly withdrawn, is uncontroverted under the facts of this case. *See* the hearing transcript at 63.

Detrimental reliance may be active or passive: a party may expend resources or undertake commitments; or may fail to act because the other party promised to do something. In the area of "criminal law plea bargaining," passive detrimental reliance, is impossible. Particularly under the facts of this case, there is no way Mr. Johnson could have relied in a passive fashion to his detriment. Moreover, the State in no way explains how Mr. Johnson could have detrimentally relied in an active sense. In this context, active detrimental reliance is equallly a *non sequitur:* what possible affirmative steps could Mr. Johnson, or any criminal defendant, take to legally alter his position under facts like these?[7]

Thus, because an accepting defendant cannot detrimentally rely on a prosecutor's reneged offer, merely phrasing the question in these terms produces only one possible result: no enforcement.[8]

---

[7] What the State is actually suggesting is that the government would never be bound by its word until after the criminal defendant had actually uttered the word "guilty" to the trial court, or had otherwise been harmed. In other words, the argument is, the government may continue to negotiate—breaking its promises in the process—without giving the defendant any recourse, until this form of repression literally made *any* other remedy impossible. To enshrine such a capacity for abuse in the law of the land would be a tragedy. Moreover, it would be only a short step away from saying: it is perfectly acceptable to extract confessions by torture *as long as you don't do permanent injury;* illegal searches are permissible, *as long as they do not turn up harmful evidence.* Formalizing a rule that would allow for ready oppression by the prosecution surely would "drive the practice of plea bargaining back into the shadows from which it has so recently emerged." Blackledge v. Allison, 431 U.S. 63, 76 (1977).

[8] The tautology in its more extended form runs as follows: A defendant who accepts a prosecutor's offer to plead guilty must detrimentally rely on the bargain in order to enforce it; detrimental

3. DUE PROCESS CONSIDERATIONS

(A) No Reliance, No Due Process Violation?

At the heart of the State's attack on the Eighth Circuit's opinion is the idea: if there was no reliance (that is, material change in position or prejudice), then there can be no due process violation.

Even if facially beguiling, this reasoning must be rejected for at least three reasons.

1. Criminal defendants should, as the Eighth and Fourth Circuits have recognized, have a right to have their bargains with the prosecution enforced as a matter of fundamental fairness. Although not explicated in either opinion, such a right is consistent with the due process rights that have long been afforded those accused of a crime. Thus, an accused has a right to be told what his rights are, *Miranda* v. *Arizona*, 384 U.S. 486 (1966); to be represented by counsel; *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)[9]; to be free from illegal searches and seizures, *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); to not have a confession coerced, *Brown* v. *Mississippi*, 297 U.S. 278 (1936); or to have such a confession suppressed, *Jackson* v. *Denno*, 378 U.S. 368 (1965); to a copy of the trial transcript, *Griffin* v. *Illinois*, 351 U.S. 12 (1955); and assistance of counsel on appeal, *Douglas* v. *California*, 372 U.S. 353 (1963). Moreover, an accused—presumed innocent—is to suffer no diminution of rights or punishment, *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

---

reliance is impossible for the accepting defendant; therefore, the bargain may not be enforced. The Aristotelian logic of the argument is flawless, but it ignores totally practical reality.

[9] Competent Counsel too, *see*, e.g., McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

The State suggests that none of these protections has any bearing on the right of an accused to give up the central right which is the key upon which the others are predicated: the right to be presumed innocent. All of those due process protections are surrendered upon entry of the guilty plea. But the crucial consideration for present purposes is not the surrender of those rights but the fact that they exist, based not on contract, but upon the principle of fundamental fairness. And, inherent in this complex of rights is the principle that the state must treat the criminally accused with fairness, *regardless* of the accused's conduct before or after the possibility of guilt centers upon him.[10]

Contrary to the State's suggestion, logically an accused has at least as many rights or protections in the decision to give up his rights, as he does in seeking to enforce them.

Foremost among those rights—as recognized by the Eighth and Fourth Circuits—should be the right to be treated fairly during the decision to relinquish those rights. A different decision would be anomolous, for it would place the Court in the position of saying that an accused has due process rights as he proceeds through the criminal justice system—rights for which he does not bargain and gives nothing—yet has no rights at all when he bargains to give up some or all of those other rights.

2. As this Court has recognized, plea bargaining is an essential component of our judicial system, *Santobello* v. *N.Y.*, 404 U.S. 257 (1971). If either party to the process uniformly refused to proceed with negotiations, the court

---

[10] Interestingly, the honesty and integrity of the government in its dealings with criminal defendants is not discussed in Government of Virgin Islands v. Scotland, 614 F.2d 360 (3rd Cir. 1980).

system would be crippled. While not suggesting that the state must enter into bargaining discussions in any particular case, *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), it is manifest that the state *must* negotiate pleas in most cases.[11] Without pleas in most cases, or a gigantic increase in the public outlay for prosecutions (both for increased court and prosecution staffs), the public is ill-served.

While it is a remote possibility indeed that all negotiations in criminal matters would breakdown or expire, the central nature of such negotiations is readily apparent. Not only must such negotiations continue for the public good,[12] once negotiations are undertaken, they must be attended with scrupulous good faith. Such good faith not only serves the public's interest in our system of justice, but insures the continued participation of defendants in the process.

3. The State's suggestion that defendants should have no right in the plea bargaining process finds no support in the criminal justice system generally. As already outlined, it is clear that unconvicted defendants do, consistent with their presumed innocence, enjoy many parallel and unnegotiated rights. Also, defendants who elect trial are accorded a wide panoply of rights, given their presumed innocence: trial by jury, *Duncan* v. *Louisiana*, 391 U.S. 145 (1969); trial by an impartial jury, *Groppi* v. *Wisconsin*, 400 U.S. 505 (1971); to a speedy

---

[11] Petitioner's brief at 25 n. 16 amply demonstrates the crucial role of plea bargaining. Virtually all of the criminal cases in the country are resolved by negotiations. This is consistent with the figures cited by this Court in Santobello.

[12] Which is served not only by holding down costs, but by the least corrosive, and hopefully most salutory, of processes—an acknowledgement of wrongdoing in exchange for a fair disposition under the circumstances. *See*, Santobello at 260.

trial, *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); a jury of his peers, *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); to have a jury uninfluenced by publicity, *Shepard* v. *Maxwell*, 384 U.S. 333 (1966); and to confront and cross examine the witness against him, *Pointer* v. *Texas*, 380 U.S. 400 (1965).

Additionally, it is now abundantly clear that under our system of justice, even those convicted of major crimes against society do not lose all of their constitutional rights, *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), particularly rights of due process, *Morrisey* v. *Brewer*, 408 U.S. 471 (1972) (rights to due process hearing in disciplinary proceedings); *Wolff* v. *McDonald*, 418 U.S. 539 (1974) (rights to due process in connection with "good time credits").

(B). No Rights To Plea Bargain.

Next, it is suggested by the State that simply because an accused has no right to plea bargain, he has no right to enforce such agreements if reached.

Mr. Johnson has never suggested he had a right to force the prosecutor to make him an offer. Rather, and as the Eighth Circuit found, once the prosecutor decided to do so, the prosecutor had to be both accurate and scrupulous in making one.

Although the State suggests it should be held to no burden at all in the plea bargaining process, the settled law suggests the absolute contrary is true.

For one thing, the state must extend many rights to defendants which are not negotiable at all. In those areas in which negotiations, or a waiver of rights, might occur, the state is strictly limited in the way it must conduct itself, *Brewer* v. *Williams*, 430 U.S. 387 (1977).

Moreover, in light of the fact that the state must accord a defendant many rights with no bargaining at all, it is disingenuous in the extreme to suggest that when the state does decide to bargain with an accused—presumably, in the best interests of both—that it owes defendant nothing, *even where, as in this case, there is a consummated agreement made in good faith.*[13]

Particularly in instances like respondent's, the lower courts have found enforceable bargains, even when the prosecution was incapable of performance, *Palermo* v. *Warden*, 545 F.2d 286 (2nd Cir. 1976); *U.S.* v. *Lieber*, 473 F. Supp. 884 (S.D.N.Y. 1979).

Courts daily hear and determine evidence on such claims, and make rulings which seem warranted under the proven facts. Nothing greater is suggested here. If the prosecutor elects to enter plea negotiations, and some understanding is reached which the prosecutor then renounces, the bargaining defendant is entitled to a hearing on the terms of the purported agreement.[14]

---

[13] Good faith is required in all commercial contracts for sales. It is hard to image that "deals" in the criminal law setting are deserving of a lower standard of conduct. *See*, UCC provision 1-203 as embodied in Ark. Stat. Ann. 85-1-203.

[14] The State, however, says not even this right exists. However, nothing seems more fundamental to our system of justice than the opportunity to be heard on a disputed question of fact: was an agreement reached or not? If yes, then the accused is entitled to the opportunity to enter his/her guilty plea (surrendering a host of fundamental rights). If not, the state is entitled to continue with bargaining or to seek a jury trial in the vindication of the public interests in justice.

Such due process rights are consistently applied whenever adverse government actions are involved, *Goldberg* v. *Kelly*, 397 U.S. 179 (1970).[15]

4. THE SUPPOSED PROPHYLACTIC RULE

The State also argues that the Eighth Circuit's so-called prophylactic rule is unnecessary to the integrity of the plea bargaining process. This is so, the argument runs, because the defendant is "not without recourse" and because of some unspecified (if not imaginary) "inherent safeguards of the plea bargaining process." Amicus at 18 and at n.20. Particularly under the facts of this case, this argument is nonsense. Moreover, it is predicated on a misunderstanding of what the Eighth Circuit actually said.

As advanced, the State claims that the Eighth Circuit announced a prophylactic rule because it:

> *[P]erceived a possibility* that the government could "take advantage of [the defendant's] acceptance of the plea proposal," perhaps by "exploit[ing] [his] decision to plead guilty by further hard bargaining and by recommending a long sentence."

Amicus at 18.

This manipulated quotation clearly misconstrues the holding below and the facts of this case because the Eighth Circuit was concerned not with the *possibility* of exploitation by the prosecutor, but with the fact that such exploitation had already taken place.

Indeed, the facts show that an offer to plead guilty to 21-year concurrent terms was communicated to respon-

---

[15] The Scotland court explicitly understands that there is a distinction between the court's recognition of a valid plea and its acceptance of that plea. Scotland at 364.

dent's counsel. He in turn communicated the offer to respondent, who accepted. This acceptance was conveyed to the prosecutor, who afterwards announced that a mistake had been made and that, notwithstanding Mr. Johnson's acceptance, the offer was withdrawn. A second offer for a 21-year consecutive term was then made. After some months of delay, this offer of a doubled term of confinement was eventually accepted by respondent.[16]

Thus, because the prosecutor had *in fact* taken advantage of respondent's willingness to plead guilty, had *in fact* continued bargaining and had *in fact* eventually driven home a tougher bargain, the Eighth Circuit stated:[17]

> We will not allow the government to take advantage of petitioner's acceptance of the plea proposal, in the absence of any change in the underlying circumstances, and to exploit petitioner's decision to plead guilty by further hard bargaining and by recommending a longer sentence.

Joint Appendix at 37.

The suggestion, therefore, that this is supposedly a "prophylactic rule" does not square with the facts or the opinion below.

Also tangled up with this mistaken view of the facts and the Eighth Circuit's opinion, is the State's suggestion

---

[16] Amicus at n. 18 appears to suggest that both defense counsel and the prosecutor may freely lie to one another in the bargaining process as a matter of mere "tactics." The only other possible reading of this footnote is that attorneys on both sides may make promises they do not intend to keep in an effort to see how earnestly the opposition seeks to avoid trial. Either position is unacceptable.

[17] This quotation is the source of the State's partial quotation extracted above.

that unless the prosecutor's conduct is actually shown to be improper, the bargain as struck should not be enforced. It is clear, however, that such a showing of actual impropriety on the part of the prosecutor would be virtually impossible. Accordingly, the court below, and the Fourth Circuit in *Cooper* v. *U.S.*, 594 F.2d 12 (4th Cir. 1979), placed the burden of showing legitimate grounds for the withdrawal of the bargain on the prosecution. No such showing was made here.

In the absence of some proof that the prosecutor's mistake truly justified a withdrawal of the bargain, the Eighth Circuit was obviously unwilling to assume the same. This Court should be likewise reluctant to assume such, and in similar contexts has held that unexplained harshness to criminal defendants is impermissible, *North Carolina* v. *Pierce*, 395 U.S. 711 (1969); *Blackledge* v. *Perry*, 417 U.S. 21 (1974).

5. SIXTH AMENDMENT CONSIDERATIONS

Following the rationale in *Scotland*, *supra*, it is argued that breached plea bargains do not implicate the Sixth Amendment right to effective counsel. For reasons both peculiar to this case, and generally, this argument should not be adopted.

Unlike *Scotland*, no attempt was made here by respondent's trial attorney to enforce his bargain with the prosecution. Inasmuch as the attorney who handled this case from the day of the broken bargain until respondent entered his ultimate plea to the doubled sentence was found to have been ineffective in his representation, this failure is not surprising.

But even apart from the facts of this case, to ignore the Sixth Amendment aspects of the bargaining process would be incorrect. Only in the most rare of instances will

a criminal defendant bargain directly with the government, given that any defendant too poor to afford counsel must have one appointed. Particularly in those instances, where as here, appointed counsel *appears* as an arm of the government,[18] it is essential to the foundations of this system that a defendant can rely on his counsel. If the government is allowed in any way to undercut this relationship, it all too easily will lead to further suspicions that such counsel represents the government and not the client, and may by lack of confidence impair counsel's ability to adequately prepare due to client mistrust. In other words, the attorney-client relationship—especially in the criminal setting—must be founded in complete trust. If the client's trust of his counsel is dashed by the government, it may well cause him to hold back crucial facts to his defense.[19] The mere possibility of this occurrence interjects into the relationship a factor which has the potential to destroy the very basis for *Gideon, supra*, which is that attorneys are absolutely essential to the criminal justice system. Indeed, *Gideon* assumes—and a legion of Circuit court cases make clear—mere appointment is not enough: the attorney appointed must be effective, which obviously means he must be allowed to be so.[20] Any impediment to this relationship imposed by the

---

[18] Appearances in this context do count, even if strictly speaking such appearances do not amount to actual state action, Polk County v. Dodson, 102 S.Ct. 445 (1981).

[19] Any withheld facts are equally important in bargaining as well as trial.

[20] It is difficult enough in any criminal setting to obtain the complete confidence and revelation of a defendant. If the government is allowed to intrude into that relationship in any way, there is almost no likelihood that the necessary prerequisities will ever be accomplished.

government is intolerable. In short, a ruling which would allow the government to make defense counsel appear ineffective is tantamount to a holding that *Gideon* and its progeny are a sham: appointment is sufficient, even if the government may be able to make that appointment appear less than vigorous, or even worse, tainted.

6. THE REMEDY

In arguing that the remedy here (specific performance) is inappropriate, the State makes several serious admissions. These admissions, rather than indicating reversal, as urged, indicate the contrary.

First, it is noted that specific performance is "often the least disruptive remedy," Amicus at 24. Respondent agrees.

Second, "[s]pecific performance is often a more convenient remedy because it does not entail holding a trial," Amicus at 24. Again, respondent agrees.

Third, "[s]pecific performance may be considered more appropriate once a significant portion of the sentence has been served." Amicus at 24. (Citations omitted). Respondent certainly agrees since *all* of his sentence under the terms of the *enhanced agreement* was served and he is now free on parole.

Fourth, it is argued that the passage of time often makes successful retrial "less likely." Amicus at 24, (Citations omitted). Again respondent agrees, precisely because of the facts of this case. Not only has it been 14 years since respondent's original trial, but Mr. Siscoe, the

main witness against respondent at his original trial, is dead.[21]

Finally respondent would certainly agree that specific performance is the appropriate remedy where, as here, "the government has already received what it bargained for, and it would not be possible to 'wipe the slate clean' by merely vacating the plea." Amicus at 24-5.

7. GRAVE UNCERTAINTY AND INTERFERENCE?

(A). Grave Uncertainty.

The State perceives that to uphold the decisions below would induce grave uncertainties into the plea bargaining process. The essence of this fear stems from the fact that plea agreements like those of respondent's are not in writing and are not placed upon the record. This apprehension is misplaced.

First, there are no facts in the record of this matter which would cause any uncertainty that a bargain was offered, accepted and then repudiated.[22] Unquestionably, it is possible to conceive of instances where a dispute between the prosecutor and the defense over what was offered and accepted may occur. However, that is not this

---

[21] On the other hand, from respondent's viewpoint, his defense is prejudiced because a key witness, Eddie Jackson, is unavailable. The failure of original defense counsel to interview or insure Jackson's availability at trial caused the district court to find that respondent's counsel was ineffective. The Eighth Circuit did not reach the question of whether this fundamental flaw in the advocacy process violated respondent's rights, requiring a shift in the burden of proof, because it upheld respondent's rights to enforce the original bargain.

[22] Because there is no factual dispute in this case over the bargain and its terms, it presents a different question than that raised in Blackledge v. Allison, 431 U.S. 63 (1977).

case. Nor should this mere possibility control the outcome. The existence and terms of alleged agreements can be resolved easily enough by trial courts.

Second, the State's position assumes that all plea negotiations are conducted in writing, or that the same are null if they are not. Most—if not virtually all—plea negotiations are conducted orally by counsel, just as settlement negotiations are conducted by counsel in civil matters. To suggest that all plea negotiations be conducted in writing would be to impose a serious impediment to the actual functioning of the criminal justice system. Moreover, it would impose by formal rule a sanction against one lawyer taking the word of another—the very basis upon which most bargains are concluded.

(B). Judicial Discretion

Although it is argued that judicial discretion would be interefered with if this decision is upheld, that is not the case. Rather, under normal circumstances, judicial discretion would be unimpaired by a ruling from this Court that defendant does have due process rights to make a prosecutor live up to his bargains.[23]

---

[23] To the degree the State suggests that the better procedure would be for defendants to bring broken bargains to the attention of the trial court, as was done in Scotland, respondent agrees. That was not done by trial counsel here unfortunately. To penalize respondent because his appointed trial counsel was not sagacious or creative enough to apply Santobello to his factual situation, however, seems unduly harsh. Given that a flaw occurred in the advocacy on respondent's behalf a decade and a half ago, it was not improper for the Eighth Circuit to order direct relief. Even the amicus admits that federal courts do have sufficient supervisory authority in cases of proven constitutional violations to order such relief. Amicus at 26. Of course, the relief ordered is only rational if this Court also finds

Whether the trial court is compelled to adopt the strict terms of such a bargain is a different question. Respondent has not—nor does not—suggest that a judicial finding that a bargain had been struck is necessarily binding on the court which may put that agreement into effect.

(C). Prosecutorial Discretion.

The decision below does not tamper with prosecutorial discretion. Indeed, such discretion is left unimpaired insofar as its exercise in non-abusive ways is concerned. A prosecutor may, for example, withdraw offers where the defendant has not disclosed important information or where the prosecution had discovered new evidence.[24]

The decision below does not allow a prosecutor, however, to plead mistake without coming forward with some evidence that this supposed mistake was in fact innocent and justified. Such proof, however, was *never offered* by the State at the hearing in this matter.

(D). The Withdrawal Of "Innocent" Misstatements.

Finally, it is argued that the State should be allowed to correct its "innocent misstatements" (Amicus at 29) about the actual offer made. Aside from the fact that no proof

---

respondent had a due process right to enforce his bargain. If not, obviously the relief ordered for him must automatically fail. But the argument against relief should not be allowed to do double duty: that is, the fact that relief was ordered somehow demonstrates no constitutional rights were involved.

[24] Under the facts of this case, the prosecution would be unable to prove either. Afterall, this case had been fully tried on the merits once, and the bargaining that took place obviously benefited from this history. The State put on no evidence concerning how the terms of the offer were withdrawn.

was offered here that the alleged misstatement was "innocent,"[25] this Court should be cautious about accepting mere claims of innocence without some proof. Prosecutorial abuse does exist.

Equally important is the requirement that a prosecutor make plea offers with exactitude. Even the court in *Scotland* found such a proposal unremarkable. *Id* at 264. And indeed it is. No defense attorney worth his salt would ever propose a bargain to which his client had not assented. The prosecution should be held to the same standard.

Accuracy in bargaining among attorneys is not the maximum to be expected, it is the minimum. Any deviation should be condemned, and certainly not approved by this Court. Mere sloppiness by the prosecution in its presentations of bargains should not be ratified by this Court on any grounds—constitutional or otherwise. Such conduct is beneath the standards expected by any member of the bar of any state or federal court.

8. MOOTNESS ISSUE

As indicated above, respondent pleaded guilty to the more onerous sentence proposed by the state after he had agreed to a lesser sentence suggestion.

Respondent has now served the entirety of the more harsh sentence, and is now free on parole.

Given these facts, it is doubtful that the grant of certiorari in this case is provident, or is at least moot.

---

[25] The testimony was that the offer was made, accepted and communicated. Only then did the prosecutor insist that any plea be for 21-years *consecutive*, as opposed to *concurrent*.

A fundamental prerequisite of federal court jurisdiction is that an action present an actual "case or controversy" for judicial review. *O'Shea* v. *Littleton*, 414 U.S. 499 (1974). *See*, United States Constitution, Article II, § 2. Thus, federal courts lack authority to entertain cases which have lost their justiciable character as a case or controversy because the "issues presented no longer 'live'." *Powell* v. *McCormick*, 395 U.S. 486, 496 (1969). A formerly justiciable controversy can be mooted by subsequent developments. Indeed, this Court has made clear that a case must remain vital at all stages, not merely at its inception. *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Steffel* v. *Thompson*, 415 U.S. 452 (1974).

In facts like those presented here, the Court has either improvidently granted certiorari, or has done so when the case is moot. Accordingly, this case should be dismissed.

CONCLUSION

If the Court reaches the merits of this case, it should affirm the opinion of the Eighth Circuit.

Respectfully submitted,

RICHARD QUIGGLE
904 W. Second Street
P.O. Box 2651
Little Rock, AR 72203
501/375-2963
Court-appointed Counsel for Respondent